IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 10TH DAY OF AUGUST, 2018

BEFORE

THE HON'BLE MRS.JUSTICE S.SUJATHA

**W. P. No.30388/2015 (T-IT)**

**BETWEEN:**

M/s. T T K PRESTIGE LTD
A COMPANY INCORPORATED
UNDER THE COMPANIES
ACT 1956, HAVING ITS
REGISTERED OFFICE AT
No.135, "BRIGADE TOWERS"
11TH FLOOR, BRIGADE ROAD,
BENGALURU-560025.
REPRESENTED BY ITS
P.A HOLDER
SRI. N.RADHAKRISHNAN. ...PETITIONER

(BY Dr. KRISHNA R.B., ADV.)

**AND:**

THE DEPUTY COMMISSIONER
OF INCOME TAX
CIRCLE 7(1)(1)
BENGALURU, 4TH FLOOR
RASTROTHANA BHAVAN
No.14/3, OPP. RBI,
NRUPATHUNGA ROAD
BENGALURU-560001. ...RESPONDENT

(BY SRI K.V.ARAVIND, ADV.)

THIS W.P. IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH THE NOTICE ISSUED BY THE RESPONDENT DATED 11.02.2014 UNDER SECTION 148 OF THE ACT VIDE ANNEXURE-G AS ALSO THE ORDER DATED 01.07.2015 ISSUED BY THE RESPONDENT

REJECTING THE OBJECTIONS OF THE PETITIONER VIDE ANNEXURE-Q AND ETC.

THIS PETITION HAVING BEEN HEARD AND RESERVED ON 27.07.2018, COMING ON FOR PRONOUNCEMENT OF ORDER THIS DAY, ***S.SUJATHA J.,*** MADE THE FOLLOWING:

**O R D E R**

This Writ Petition is filed by the Petitioner-Assessee challenging the Notice [Annexure-G] dated 11.02.2014 issued under Section 148 of the Income Tax Act, 1961 ['Act' for short] as also the Order dated 1.7.2015 [Annexure-Q], issued by the Respondent, rejecting the objections of the petitioner.

2. This is the second round of litigation, as much as, the challenge made to the Notice dated 11.02.2014 [Annexure-G]. In the first round of litigation, Petitioner-Assessee had challenged the Notice as well as the Order dated 6.1.2015 issued by the Respondent, rejecting the objections of the petitioner to the notice under section 148 of the Act. This Court in Writ Petition No.1248/2015 vide Order dated

25.06.2015, setting aside the Order dated 6.1.2015 had remitted the matter to the Assessing Officer ['AO' for short] for consideration afresh over the petitioner's objections and to pass a speaking order in accordance with law assigning the reasons after extending an opportunity of hearing to the petitioner, within a week from the date of the Order. The petitioner was directed to appear before the Authority on 29.06.2015 at 3 pm without further notice. In pursuance to the aforesaid order of this Court dated 25.06.2015, the respondent-AO passed an order on 1.7.2015 [Annexure-Q] rejecting the objections of the Assessee for reopening the proceedings under section 147 of the Act. Hence this writ petition.

3. The facts in brief are:

The petitioner is a limited company incorporated under the Companies Act, 1956 and is a manufacturer and seller of domestic kitchen home appliances like

pressure cooker, non-stick cookwear, gas stoves, mixies etc. The petitioner is an Assessee under the Act. The return of income for the Assessment Year 2009-10 was filed by the petitioner with the respondent on 30.09.2009. One of the deductions claimed by the petitioner in the said return and computation was a sum of Rs.1.99 Crores representing the licence fee paid to M/s.TT Krishnamachari & Company [TTK & Company] for use of the logo 'ttk' owned by the Licensor. The consideration was fixed at 0.5% of the net sales value. The Agreements dated 27.04.2007 and 15.01.2009 were entered into between the parties in this regard. The crucial issue in this petition is assumption of jurisdiction by the respondent in issuing notice under section 147 read with section 148 of the Act, for reopening the assessment, completed under section 143[3] of the Act, relating to the Assessment Year 2009-10.

4. It is the contention of the petitioner that the very same issue came up for adjudication for the Assessment Year 2007-08. Submissions were made by the petitioner pertaining to this issue in terms of the letter dated 11.08.2009. The respondent, after considering the same, completed the assessment under section 143[3] of the Act for the Assessment Year 2007-08, accepting the claim of the petitioner for allowances of the logo fees as 'revenue expenditure'. However, notice dated 11.02.2014 issued under section 148 of the Act was served on the petitioner to reassess the petitioner under section 147 of the Act. The petitioner complying with the said notice, filed return on 13.03.2014. The copy of the reasons recorded prior to the issue of notice under section 148 of the Act was made over to the petitioner by the respondent vide letter dated 6.6.2014, to which the petitioner filed objections to the effect that the logo fees paid was not capital expenditure and licence fee was computed based on

turnover. It was, thus, contended that the action of the respondent in issuing notice under section 148 of the Act was based on a mere 'change of opinion'. The respondent rejected the objections of the petitioner holding the expenditure to be non revenue in nature, against which the petitioner moved before this Court in Writ Petition No.1248/2015 and pursuant to the directions of this Court, respondent passed the impugned order herein dated 1.7.2015 [Annexure-Q to the writ petition], rejecting the objections of the petitioner to the notice under section 148 of the Act. Hence, this writ petition.

5. **Submissions of the learned counsel appearing for the petitioner:**

Learned Counsel Dr. R.B. Krishna submitted that the impugned notice dated 11.02.2014 and the impugned order dated 1.7.2015, issued by the respondent are wholly without jurisdiction. It was submitted that the respondent has denied the fact of

reopening the assessment concluded under section 143[3] of the Act based on any audit query. If so, the AO had no tangible material to reopen the assessment and it can at best to be considered as 'change of opinion'. It was strongly argued that the essential requirement of 'reason to believe' envisaged in Section 147 of the Act is apparently not found in the reasons recorded by the AO to reopen the assessment concluded, on the ground of escapement of income to assessment.

Learned Counsel made an endeavour to highlight the importance of the words 'reason to believe' employed in section 147 subsequent to the amendment to the said provision by the amending Act of 1989 with effect from 1.4.1989 in giving a schematic interpretation to the words 'reason to believe'.

The conceptual difference between the power to review and power to reassess was brought to the notice

of the Court, arguing that, on concluding the assessment under section 143[3] of the Act, with all the material facts available on record, the presumption u/s. 114[e] of the Indian Evidence Act, 1872 would be that the AO has looked into all the aspects of the matter made available in the return filed and the documents supplied along with the return. If an opinion is framed by the AO concluding the assessment order under section 143[3] of the Act, reopening the same without there being any tangible material would be nothing but 'change of opinion'. The AO becomes functus officio after concluding the assessment under section 143[3] of the Act and it is only in the circumstances where there is **'reason to believe'** that there is an escapement of income to assessment, Section 147 can be invoked, otherwise it is a review made by the AO with 'change of opinion'. Learned Counsel submitted that the return as well as the other documents made available to the AO clearly indicated the logo commission expenditure

expended by the petitioner and the disallowance claimed as 'revenue expenditure'. It was pointed out that for the Assessment Year 2007-08, a query was made by the AO and in terms of the reply filed by the Assessee dated 11.08.2009, it was brought to the notice of the AO that the logo commission refers to the amount paid in consideration of a Licence by TTK & Co., to TTK Prestige Ltd., to use the logo 'ttk' on the products sold; this amount is computed at 0.5% of the total sales; the details of credit notes issued have already been provided along with the auditors report in annexures. Similarly, for the assessment year in question, on the query made by the AO, document relating to Schedule of Miscellaneous Expenses reflecting the licence fee/logo amounting to Rs.1,98,97,036/- was submitted for examination. That being the position, the assessment orders passed for the assessment years 2007-08 and 2009-10 reflects the application of mind by the AO on this subject matter and reopening the issue for the

current Assessment Year 2009-10 fortifies that it is nothing but the change of opinion made by the AO.

Learned Counsel argued that there must be consistency in the orders of the Authorities passed while exercising quasi judicial functions. For the previous years as well as for the subsequent years, the assessments are concluded allowing the claim of the Assessee on the issue of this logo commission as 'revenue expenditure' except for the assessment year 2009-10. Learned Counsel also pointed out that the notice under section 148 of the Act was issued for the Assessment Year 2009-10 on 11.02.2014. However, the respondent completed the assessment under Section 143[3] on 25.03.2014 for the Assessment Year 2011-12, allowing the revenue expenditure claimed towards logo fees. These factual aspects demonstrate that all the material facts were on the record when the assessment for the Assessment Year 2009-10 was made.

Nextly, it was contended that the licence fee paid by the petitioner was the fee for use of the monogram 'ttk' and that too for a certain period as per the agreement entered into between the Assessee and the TTK & Company. The brand name always vested with the TTK & Company. The right to use the monogram cannot be construed as a goodwill. No doubt, goodwill is an asset, but what was paid by the petitioner was not for the exclusive right to use the monogram. The other companies are also paying the licence fee to use the very same monogram 'ttk'. This very issue was adjudicated before the Income Tax Appellate Tribunal, Chennai and the decision was rendered in favour of the Assessee and has reached finality. Though this material fact was brought to the notice of the AO while filing the objections to the notice under Section 148, the same has not been considered and addressed by the AO.

It was further argued by the learned Counsel that the reasons recorded by the AO to invoke section 147 of the Act does not disclose escapement of income for assessment and how it has come to his notice. The audit report was also placed before the AO disclosing the licence fees paid on logo to M/s. TTK & Company of Rs.1,98,97,036/-. There was no withholding of any material facts by the Assessee, taking a different stand for a single Assessment Year 2009-10 by the Assessing Officer would indicate the arbitrary exercise of power by the AO with 'change of opinion' and the same is unsustainable.

Learned counsel further argued that no opportunity of hearing was provided as directed by this Court in W.P.No.1248/2015. The request made by the Assessee for grant of time was denied.

In support of his contentions, learned Counsel placed reliance on the following Judgments:

[a] ***'COMMISSIONER OF INCOME-TAX vs. KELVINATOR OF INDIA LTD.,' vs. [(2010) 320 ITR 561 (SC)]***

[b] '***COMMISSIONER OF INCOME TAX vs. USHA INTERNATIONAL LTD.' [2012] 348 ITR 485 (DELHI).***

[c] ***M/s. RADHASOAMI SATSANG, SAOMI BAGH, AGRA vs. COMMISSIONER OF INCOME TAX [(1992) 1 SCC 659].***

[d] ***"MESSEE DUSSELDORF INDIA P. LTD., vs. DEPUTY COMMISSIONER OF INCOME-TAX, TRANSFER PRICING OFFICER AND ANOTHER' [(2010) 320 ITR 565 [DELHI].***

[e] ***ASSISTANT COMMISSIONER OF INCOME TAX AND OTHERS vs. ICICI SECURITIES PRIMARY DEALERSHIP LTD. [2012] 348 ITR 299 (SC)***

[f] '***COMMISSIONER OF INCOME TAX vs. I.A.E.C. (PUMPS) LTD.,' [(1998) 150 CTR SC 126***

6. **Submissions of the learned Counsel for the Revenue:**

Learned Counsel Sri. K.V. Aravind appearing for the Revenue inviting the attention of the Court to Section 147 and the first proviso therein with explanation [1] and [2], submitted that filing of the return disclosing fully and truly all material facts for assessment for that Assessment Year or making available all the material facts for assessment would not preclude the AO to invoke Section 147 of the Act if the proceedings are initiated within the period of four weeks from the end of the relevant assessment year in case of an assessment concluded under section 143[3] of the Act. Production of all account books or other evidence before the AO from which, escapement of income to assessment has been discovered by the AO subsequently, would not prohibit the reopening of the assessment under section 147 of the Act.

Learned Counsel submitted that passing of the order under Section 143[3] of the Act either for the previous year or subsequent years allowing the expenditure claimed by the Assessee as 'revenue expenditure' towards logo commission paid to TTK & Company at most could be considered as escapement of income to assessment, but not the opinion formulated therein. According to the learned Counsel, unless the subject matter of commission of logo is deliberated, addressed and opinion/finding is given by the Authorities, it cannot be held that the AO has applied his mind to the subject matter and formed an opinion. In none of the orders passed under Section 143[3] of the Act, there is any deliberation or opinion formulated by the AO. In such circumstances, at no stretch of imagination, it can be construed that the opinion taken by the AO in the order passed under Section 143[3] has been changed now to invoke the proceedings under

section 147 of the Act. If the order is silent on the particular issue of logo commission paid to TTK & Company, it indicates the non application of mind by the AO. The AO had 'reason to believe' that there was escapement of income to assessment, considering the material on record. The Assessee while furnishing the details for miscellaneous expenses claimed at Rs.402.36 lakhs, claimed an amount of Rs.1,98,97,036/- as expenses towards licence fee/logo. As this expenditure claimed, is in the nature of goodwill and having enduring benefit, needs to be capitalized and added back to income. Omission to do so has resulted in under assessment of income and the same has been reflected in the reasons recorded by the AO for reopening the case for Assessment Year 2009-10. Goodwill has to be considered to be an asset and reference is made to the Judgment of the Hon'ble Apex Court in the case of ***'COMMISSIONER OF INCOME TAX***

***vs. SMIFS SECURITIES LTD.,' [(2012) 348 ITR 302 (SC)],*** in this regard.

It was further argued that the words 'reason to believe' interpreted in catena of Judgments of the Apex Court, throws light in as much as the power conferred on the AO to reassess the income. Reference is made to the recent Judgment of the Hon'ble Apex Court in the case of ***'INCOME TAX OFFICER WARD NO.16(2) vs. M/s. TECHSPAN INDIA PRIVATE LTD. & ANOTHER*** in Civil Appeal No.2732/2007 [DD – 24.04.2018]. In the absence of formulation of opinion on the very subject matter by the AO while passing the assessment order under Section 143[3] of the Act, would not render the belief of escapement of income to assessment as 'change of opinion'. According to the learned Counsel, there was no formulation of any opinion by the AO on this particular aspect of the expenditure claimed towards the logo commission paid to TTK & Company, or in

other words, it was a case of 'no opinion'. Merely for the reason that the order under Section 143[3] is silent on this aspect, it cannot lead to the presumption of application of mind by the AO.

Learned Counsel further argued that the principles of res judicata does not apply to income tax proceedings. Each assessment year being a unit, different and distinct, what is decided in one year may not be made applicable for the subsequent year/previous year. Learned Counsel made an endeavour to distinguish the Judgments referred to by learned Counsel for the Petitioner.

It was submitted that the respondent-AO had jurisdiction to invoke section 147 of the Act and considering the objections filed by the assessee in compliance with the directions issued by this Court in Writ Petition No.1248/2015, rightly rejected the same

assigning valid reasons after hearing the Assessee which do not warrant any interference by this Court.

Learned Counsel relied upon the Judgment of the Hon'ble Apex Court in the case of ***'ASSISTANT COMMISSIONER OF INCOME TAX vs. RAJESH JHAVERI STOCK BROKERS [P] LTD.,' [(2007) 291 ITR 500]***.

7. Before adverting to the arguments advanced by learned Counsel for the parties, it is apt to collate the legal position enunciated by the various courts on the point of invoking section 147 of the Act, vis-à-vis, interpretation of the phrase 'reason to believe' qua the concept of 'change of opinion'.

8. In the case of ***KELVINATOR*** supra, the Hon'ble Apex Court has held thus:

> *"A short question which arises for determination in this batch of civil appeals is, whether the concept of "change of opinion"*

*stands obliterated with effect from 1st April, 1989, i.e., after substitution of Section 147 of the Income Tax Act, 1961 by Direct Tax Laws (Amendment) Act, 1987?*

*To answer the above question, we need to note the changes undergone by Section 147 of the Income Tax Act, 1961 [for short, "the Act"]. Prior to Direct Tax Laws (Amendment) Act, 1987, Section 147reads as under:*

*"147. Income escaping assessment. – If –*

*[a] the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or*

*[b] notwithstanding that there has been no omission or failure as*

*mentioned in clause (a) on the part of the assessee, the Income- tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year)."*

*After enactment of Direct Tax Laws (Amendment) Act, 1987, i.e., prior to 1st April, 1989, Section 147 of the Act, reads as under:*

*"147. Income escaping assessment. – If the Assessing Officer, for reasons to be recorded by him in writing, is of the opinion that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions*

*of Sections 148 to153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year)."*

*After the Amending Act, 1989, Section 147 reads as under:*

*"147. Income escaping assessment. – If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which*

*has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)."*

*On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment.*

*Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from*

*assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer."*

9. Though the decision in the case of ***ICICI SECURITIES*** supra, relates to first proviso to Section 147, it would be appropriate to quote the findings of the Hon'ble Apex Court which runs thus:

*"The assessee had disclosed full details in the return of income in the matter of its dealing in stocks and shares. According to the Revenue, the loss incurred was a business*

*loss, whereas, according to the Revenue, the loss incurred was a speculative loss. Rejection of the objections of the assessee to the reopening of the assessment by the Assessing Officer, vide his order dated 23rd June, 2006, is clearly a change of opinion. In the circumstances, we are of the view that the order reopening the assessment was not maintainable."*

10. The full Bench of Delhi High Court in the case of ***USHA INTERNATIONAL LTD.,*** supra, had considered the following substantial questions of law.

*"(i) What is meant by the term "change of opinion?*

*(ii) Whether assessment proceedings can be validly reopened under Section 147 of the Act, even within four year, if an assessee has furnished full and true particulars at the time of original assessment with reference to income alleged to have escaped assessment and whether and when in such cases*

*reopening is valid or invalid on the ground of change of opinion?*

*(iii) Whether the bar or prohibition under the principle "change of opinion" will apply even when the Assessing Officer has not asked any question or query with respect to an entry/note, but there is evidence and material to show that the Assessing Officer had raised queries and questions on other aspects?*

*(iv) Whether and in what circumstances Section 114 (e) of the Evidence Act can be applied and it can be held that it is a case of change of opinion?"*

Analyzing the Judgments of the Hon'ble Apex Court and Hon'ble Delhi High Court in extenso, observed thus:

*"(1) Reassessment proceedings can be validly initiated in case return of income is processed under Section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion;*

*(2) Reassessment proceedings will be invalid in case the assessment order itself*

*records that the issue was raised and is decided in favour of the assesse. Reassessment proceedings in the said cases will be hit by principle of — change of opinion.*

*(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.*

*In the second and third situation, the Revenue is not without remedy. In case the assessment order is erroneous and prejudicial to the interest of the Revenue, they are entitled to and can invoke power under Section 263 of the Act. This aspect and*

*position has been highlighted in CIT vs. DLF Powers Limited, ITA 973/2011 decided on 29th November, 2011 and BLB Limited vs. ACIT Writ Petition (Civil) No. 6884/2010 decided on 1st December, 2011. since reported in [2012] 343 ITR 129 (Delhi). In the last decision it has been observed (page 135):*

> *"The Revenue had the option, but did not take recourse to Section 263 of the Act, inspite of audit objection. Supervisory and revisionary power under Section 263 of the Act is available, if an order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. An erroneous order contrary to law that has caused prejudiced can be correct, when jurisdiction under Section 263 is invoked."*

*Thus where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to Section 263 of the Act is available*

*and should be resorted to. But initiation of reassessment proceedings will be invalid on the ground of change of opinion.*

*xxxxx xxxxx xxxxx*

*The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material, on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income-tax Officer subsequent to the original assessment. If the Income-tax Officer had considered and formed an opinion on the said material in the original assessment itself, then he would be powerless to start the proceedings for the reassessment. Where, however, the Income-tax Officer had not considered the material and subsequently come by the material from the record itself, then such a case would fall within the scope of Section 147(b) of the Act. (emphasis supplied)*

*The aforesaid observations are complete answer to the submission that if a particular subject matter, item, deduction or claim is not*

*examined by the Assessing Officer, it will nevertheless be a case of change of opinion and the reassessment proceedings will be barred.*

*We are conscious of the fact that the aforesaid observations have been made in the context of Section 147(b) with reference to the term 'information' and conceptually there is difference in scope and ambit of reopening provisions incorporated w.e.f. 1st April, 1989. However, it was observed by the Supreme Court in Kelvinator India (supra) that amended provisions are wider. What is important and relevant is that the principle of 'change of opinion' was equally applicable under the unamended provisions. The Supreme Court was therefore conscious of the said principle, when the observations mentioned above in A.L.A. Firm [1991] 189 ITR 285 were made.*

*It will be appropriate to reproduce the succeeding passage from A.L. A. Firm [1991] 189 ITR 285 (page 299):*

*We think there is force in the argument on behalf of the assessee that, in the face of all the details and statement placed before the I.T.O. at the time of the original assessment, it is difficult to take the view that the Income Tax Officer had not at all applied his mind to the question whether the surplus is taxable or not. It is true that the return was filed and the assessment was completed on the same date. Nevertheless, it is opposed to normal human conduct that an officer would complete the assessment without looking at the material placed before him. It is not as if the assessment record contained a large number of documents or the case raised complicated issues rendering it probable that the I.T.O. had missed these facts. It is a case where there is only one contention raised before the I.T.O. and it is, we think, impossible to hold that the Income-tax Officer did not at all look at the return filed by the assessee or the*

*statements accompanying it. The more reasonable view to take would, in our opinion, be that the Income-tax Officer looked at the facts and accepted the assessee's contention that the surplus was not taxable. But, in doing so, the obviously missed to take note of the law laid down in Ramachari which there is nothing to show, had been brought to his notice. When he subsequently became aware of the decision, he initiated proceedings under Section 147(b). The material which constituted information and on the basis of which the assessment was reopened was the decision in Ramachari. This material was not considered at the time of" the original assessment. Though it was a decision of 1961 and the I.T.O. could have known of it had he been diligent, the obvious fact is that he was not aware of the existence of the decision then and, when he came to know about it, he rightly initiated proceedings for reassessment.*

*In view of the above observations we must add one caveat. There may be cases where the Assessing Officer does not and may not raise any written query but still the Assessing Officer in the first round/ original proceedings may have examined the subject matter, claim etc, because the aspect or question may be too apparent and obvious. To hold that the assessing officer in the first round did not examine the question or subject matter and form an opinion, would be contrary and opposed to normal human conduct. Such cases have to be examined individually. Some matters may require examination of the assessment order or queries raised by the Assessing Officer and answers given by the assessee but in others cases, a deeper scrutiny or examination may be necessary. The stand of the Revenue and the assessee would be relevant. Several aspects including papers filed and submitted with the return and during the original proceedings are relevant and material. Sometimes application of mind and formation*

*of opinion can be ascertained and gathered even when no specific question or query in writing had been raised by the Assessing Officer. The aspects and questions examined during the course of assessment proceedings itself may indicate that the Assessing Officer must have applied his mind on the entry, claim or deduction etc. It may be apparent and obvious to hold that the Assessing Officer would not have gone into the said question or applied his mind. However, this would depend upon the facts and circumstances of each case."*

11. In the recent Judgment of the Hon'ble Apex Court in the case of ***M/s. TECHSPAN INDIA PRIVATE LIMITED*** [supra], it is observed as under:

*"The language of Section 147 makes it clear that the assessing officer certainly has the power to re-assess any income which escaped assessment for any assessment year subject to the provisions of Sections 148 to 153. However, the use of this power is conditional upon the fact that the assessing*

*officer has some reason to believe that the income has escaped assessment. The use of the words 'reason to believe' in Section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such re-assessment proceedings merely on his change of opinion on the basis of same facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature. The said provision was incorporated in the scheme of the IT Act so as to empower the Assessing Authorities to re-assess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge; and the said fact would have material bearing on the outcome of the relevant assessment order.*

*9) Section 147 of the IT Act does not allow the re-assessment of an income merely because of the fact that the assessing officer has a*

*change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to re-assess and not the power to review.*

*10) To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The word change of opinion implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.*

*11) It is well settled and held by this court in a catena of judgments and it would be sufficient to refer Commissioner of Income Tax, Delhi vs. Kelvinator of India Ltd. (2010) 320 ITR 561(SC) wherein this Court has held as under:-*

*"5....where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re- open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe"....*

*Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open.*

*6. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-*

*opening the assessment, review would take place.*

*7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."*

*12) Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are*

*raised in the proposed re-assessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings."*

12. As regards the applicability of the principles of *res judicata* to the income tax matters, it is appropriate to extract the relevant findings of the Hon'ble Apex Court in the case of ***RADHASOAMI SATSANG*** supra,

*"16. We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not*

*challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."*

13. As regards the 'capital expenditure', qua 'revenue expenditure', it would be beneficial to quote the relevant findings of the Hon'ble Apex Court in the case of ***I.A.E.C. (PUMPS) LTD.,*** supra, which runs thus:-

*"2. Broadly, three questions were referred to the High Court. In all of them, the question involved is "whether the amount paid by the respondent-assessee to the foreign collaborator for technical know-how is a capital expenditure or a revenue expenditure?" The High Court referred to the decision of this Court reported in CIT v. Ciba of India Ltd., and also the agreement in question. It held that ultimately, the question is to be decided on the basis of the relevant agreement. According to the High Court, the only general principle that can be derived from the decisions, is whether under the terms of the agreement, the assessee acquired a "benefit of an enduring nature"*

*which will constitute "acquisition of an asset" and so the amount paid for the same is a "capital expenditure" or whether the assessee had only acquired technical knowledge for the manufacture of any particular item for a specific duration, and he acquired only a "license to use the other party's patent and knowledge" and the amount paid would only be a "revenue expenditure". Having taken a proper view of the principles to be applied, the High Court arrived at the following conclusion:*

*"Having regard to the said Clauses, we are clearly of the opinion that the Tribunal was right in its conclusion that the whole of the amount paid by the assessee constitutes revenue expenditure and has to be allowed as a deduction. From the terms of the agreement referred to above, the following facts are clear;*

*(1) The agreement itself provides that what was granted by Aturia to the assessee is merely a license to use its patents and designs exclusively in India; (2) The*

*agreement is for a duration of 10 years with the parties having the option to extend the agreement or renew the same, subject to the approval of the Government of India; (3) During the currency of the agreement, Aturia had undertaken not to surrender its patents without the consent of the assessee and to make available to the assessee any improvements, modifications and additions to the designs; (4) Aturia has also undertaken to enable the assessee to defend any counterfeit by others and also had undertaken to (NC) expenses with reference thereto; (5) The assessee shall not disclose to third parties any of the documents made available by Aturia to the assessee without having received a written authorisation from Aturia. We are of the opinion that the above features clearly establish that what was obtained by the assessee is only a license and what was paid by the assessee to Aturia is only a license fee and not the price for acquisition of any capital asset."*

*3. We heard counsel. We are of the view that the High Court posed the correct question that arose for consideration and also applied the proper principles of law to the instant case. By applying the proper principles of law to the agreement in question, the High Court concluded that the amounts paid to the collaborator is only a "license fee" and not the price for acquisition of a "capital asset". It was concluded that the entire payment constitutes revenue expenditure and the questions were answered in favour of the assessee."*

14. As regards interpretation of Section 147 of the Act, the Hon'ble Apex Court in the case of ***RAJESH JHAVERI***'s case supra, has held thus:

*"16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer*

*has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991 (191) ITR 662], for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is 'reason to believe', but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a*

*requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ITO v. Selected Dalurband Coal Co. Pvt. Ltd. [1996 (217) ITR 597 (SC)] ; Raymond Woollen Mills Ltd. v. ITO [ 1999 (236) ITR 34 (SC)]."*

15. In the light of the Judgments referred to above, the facts of the present case are examined. The point that arise for consideration in the present case is akin to substantial question of law No.2 considered by the full Bench of the Delhi High Court viz.,

*(ii) Whether assessment proceedings can be validly reopened under Section 147 of the Act, even within four year, if an assessee has furnished full and true particulars at the time of original assessment with reference to income alleged to have escaped assessment and whether and when in such cases reopening is valid or invalid on the ground of change of opinion?*

This goes to the root of the matter in as much as the jurisdiction of the AO in invoking Section 147 of the Act. In the present case, the assessment proceedings under section 143[3] relating to the assessment year 2007-08 were concluded by Order dated 31.08.2009. The assessment order under section 143[3] of the Act relating to the Assessment Year 2009-10 was passed on 18.04.2011. The letter dated 11.08.2009 [Annexure-B to the writ petition] indicates that for the assessment year 2007-08, Assessee has furnished the following details as desired by the AO.

1. *"Statement of additions to Computers*
2. *Statement on additions to Software*
3. *Statement showing details of Sundry Debtors including due from subsidiary.*
4. *Statement Showing O/Bal., transaction and C/Bal. of Loan to Manttra Inc.*
5. *Statement showing details of Tax matter under appeal.*
6. *Statement showing details of welfare expenses.*

*7. Statement giving details of legal & Professional Fees.*

*8. Statement giving details of Advertisement and Selling expenses*

*9. Statement giving details of Miscellaneous expenses.*

*xxxxxx*

*29. Joint Development Agreement dated 14.05.2007."*

In the very said letter, in the last paragraph, it was specifically mentioned as under:

> *"Logo commission paid refers to the amount paid in consideration of a Licence by TTK & Co. to TTK Prestige Ltd. to use the Logo 'ttk' on the products sold. This amount is computed at 0.5% of the total sales. The details of credit notes issued have already been provided along with the auditors report in annexures."*

For the assessment year 2009-2010 also, on the query made by the AO, the following documents were

submitted as per the letter dated 25.01.2011 (Annexure-D)

*"1. Schedule of Distribution Expenses*
*2. Schedule of interest payments*
*3. Schedule of Advertisement Expense*
***4. Schedule of Miscellaneous Expenses***
*5. Expenditure in foreign currency*
*6. Schedule of Rates and Taxes*
*7. Bad Debts*
*8. Provision for bad debts*
*9. Rent paid*
*10. Donations"*

This would indicate that on the query made by the AO with respect to logo commission expenditure, the explanation was offered by the Assessee which calls for presumption of application of mind by the AO on this subject of expenditure towards logo commission. It is true that the principles of res judicata may not be strictly applicable to income tax proceedings. However, in the light of the Judgment enunciated by the Hon'ble Apex Court in the case of ***RADHASOAMI SATSANG***

supra, much weightage has to be given to this fact. Consistency of the orders in the same set of facts would be necessary even in the tax proceedings, when the Revenue has allowed that position to be sustained even in the subsequent assessment years 2010-11 and 2011-12. I am astound by the action of the Assessing Officer in passing the assessment order under Section 143[3] for the Assessment Year 2011-12 on 25.03.2014, allowing the expenditure claimed towards the logo commission as 'revenue expenditure' despite the fact of issuing the notice under Section 148 of the Act for the Assessment Year 2009-10 on 11.02.2014. Though learned Counsel for the Revenue contended that this Order of Section 143[3] of the Act for the previous year and the subsequent years would be an escapement of income to assessment, the same cannot be appreciated for the reason that the same set of facts claimed as licence fee paid for the use of the logo 'ttk' is subsisting for many years. As such, it is difficult to comprehend

the mind of the AO to invoke section 147 proceedings, only with respect to Assessment Year 2009-10. Further, it is also significant to note that the dispute relating to the use of the logo 'ttk' whether is 'benefit of enduring nature' constitutes, 'acquisition of an asset' and so whether amounts to 'capital expenditure' or 'revenue expenditure' for the licence fees paid has been considered and decided by the Income Tax Appellate Tribunal, Chennai in favour of the assessee which has reached finality, as contended by the petitioner.

16. To appreciate the present controversy, it would be appropriate to refer to Section 147 of the Act which reads thus:

> *""147. Income escaping assessment:-- If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax*

*which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):*

*Provided that where an assessment under sub- section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.*

*Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset [including financial interest in any entity] located outside India, chargeable to tax, has escaped assessment for any assessment year.*

*Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment. "*

Indisputably, petitioner is not claiming any assistance of the first proviso to Section 147. Admittedly, re-assessment proceedings were initiated within a period of four years from the end of the relevant assessment year. Learned Counsel for the Petitioner placed reliance on the main provision, particularly the phrase 'reason to believe' to substantiate his case.

17. The reasons recorded by the AO to invoke reassessment proceedings under Section 147 of the Act are quoted hereunder for ready reference:

> *"The assessee company has filed its return of income for the relevant assessment year on 30.09.2009 declaring total income of Rs.26,61,99,014/-. The case was assessed u/s 143(3) on 18.04.2011 determining total income at Rs.25,59,90,979/-. Subsequently it is noticed that the assessee had claimed an expenditure of Rs.14,783.96 lakh under the head expenses as per schedule 17 to accounts. However, on perusal of records it was observed that the assessee while furnishing the details for Miscellaneous expenses claimed at Rs.402.36 lakh, an amount of Rs.1,98,97,036/- was towards license fee/logo. As this expenditure claimed is in the nature of goodwill and having enduring benefit needs to be capitalized and added back to income. Omission to do so has resulted in under assessment of income by Rs.1,49,22,777/- (i.e. Rs.1,98,97,036/- less 25% depreciation applicable)."*

18. The reasons recorded by the AO discloses that on the material available on record, it was noticed that the Assessee-Petitioner has claimed an amount of Rs.1,98,97,036/- towards the licence fees/logo which is in the nature of goodwill, having enduring benefit needs to be capitalized. It is true that the material facts can be ascertained from the assessment records also and not necessarily from any other extraneous source. But, the Revenue has to establish that the Assessee had stated incorrect and wrong material facts during the assessment proceedings, culminating into an assessment order escaping the income to assessment. Presumption can be raised with respect to an assessment order passed in terms of Section 143[3] that such an order has been passed on application of mind which is well known presumption in terms of Section 114[e] of the Indian Evidence Act, 1872. Merely if the assessment order is silent or does not record the reasons, would not lead to the conclusion of non

application of mind by the AO. On the contrary, it is a presumption that the AO has applied his mind to all the material facts available at the time of passing of the assessment order if it could be inferred impliedly from the order or the existing circumstances.

19. Learned Counsel for the Revenue, on the directions issued, has placed the original records relating to the A.Y. 2009-2010 before the Court. It is discernible from the original records that the audit query was raised by the Audit Officer vide Audit Enquiry No.28 dated 10.09.2012. The text of the said audit query is extracted hereunder:

> ***"Irregular claim of expenditure:***
>
> *The assessment of M/s TTK Prestige Ltd. for the assessment year 2009-10 was concluded u/s 143(3) dated 28.04.2011 by determining the income at Rs.255990979/- later it was rectified u/s 154 and the income assessed at Rs.271568373/- by disallowing the depreciation loss.*

*Audit scrutiny of assessment records revealed that the assessee had claimed an expenditure of Rs.14783.96 lakh under the head expenses as per Schedule 17 to accounts. However, on perusal of records it was observed that the assessee while furnishing the details for Miscellaneous expenses claimed at Rs.402.36 lakh, an amount of Rs.19897036/- was towards Licence fee/logo. As this expenditure claimed is in the nature of goodwill and having enduring benefit needs to be capitalized and added back to income. Omission to do so has resulted in under assessment of income by Rs.14922777/- (i.e. Rs.19897036/- less 25% depreciation applicable) with consequent tax effect of Rs.6340340/- (including interest u/s 234B for 25 months).*

*This issue may kindly be examined."*

20. Learned AO filed a reply dated 8.7.2013 to the said audit objections. The relevant paragraphs of the same are extracted hereunder:

*"On examination of the objection with reference to the information available on record and also during the course of scrutiny assessment hearing for the A.Y.2010-11, it is seen that the amount of Rs.1,98,97,036/- was towards the expenses for license Fee/Logo and the assessee had claimed it as a revenue expenditure/business expenditure in the "Schedule of Miscellaneous Expenses". The submission of the assessee at the time assessment dated 25.01.2011 and another submission along with the Agreement dated 19.12.2012 show that by virtue of the agreement, the assessee company has been permitted to apply/use the name and logo "ttk" to promote its business by using the said name and logo on all its products, advertisements, letter heads and all communications for that the assessee is required to pay a logo license fees computed at 0.5% of its net sales value every year. It can be seen from the above, this is not a onetime payment with an enduring benefit, but is recurring business expenditure and the license of right to use the logo is restricted to*

*the period of the agreement only and ownership and the corresponding Goodwill always remains with the Licensor. As per the agreement in the event of this agreement expires or being terminated, the License shall immediately thereafter desist from using the said monogram. The ownership of the monogram is being held by an independent firm other than the assessee company.*

*In view of the above, the audit objection is factually incorrect and there is no revenue loss involved. Therefore the audit objection is found to be not acceptable. Hence, the audit objection may kindly be treated has settled."*

21. Again while seeking direction for appropriate remedial action from the Commissioner of Income Tax, AO vide letter dated 31.12.2013 has categorically observed that the audit objections are not acceptable; But, since no reply had been received to the non acceptance letter [letter sent to CIT [Audit] on 8.7.2013 through proper channel], it is necessary to initiate

remedial action; The objection does not relate to mistake apparent from the record, hence remedial action under Section 154 of the Act is not considered appropriate, recourse may be taken to Section 147 of the Act for remedial action. The order sheet dated 11.02.2014, the reasons assigned by the AO to believe that the income of the Assessee-Company chargeable to tax has escaped assessment is the verbatim repetition of the audit objections extracted earlier.

22. That the reasons recorded by the AO to invoke Section 147 being verbatim the same of audit objections, what could be inferred is that the AO had no independent reason to believe that the income of the Assessee-Company/petitioner chargeable to tax has escaped assessment. It is nothing but the change of opinion at the instance of the audit authority. The action of the AO based on the audit query would impliedly establish that there was no independent

application of mind by the AO to take a decision for reopening the assessment, rather it is manifest that the AO objected to the audit objections in giving a reply to the audit objections. The AO was of the firm view that there is no revenue loss involved and the expenditure amount of Rs.1,98,97,036/- claimed by the Assessee, towards the expenses for licence fee/logo was established to be revenue expenditure/business expenditure reflected in the "schedule of miscellaneous expenses". AO was also of the firm opinion, the Agreement dated 19.12.2012 executed by the Assessee-Company with TTK & Company shows that by virtue of the agreement, the Assessee-Company has been permitted to use the name and logo 'ttk' to promote its business by using the said name and logo on all its products, advertisements, letter heads and all communications for which logo licence fees computed at 0.5% of its net sales value every year was required to be paid, which is not one time payment with an enduring

benefit but is recurring business expenditure whereas ownership and the corresponding goodwill always remains with the Licensor. Contrary to this stand, the AO has recorded the reasons for invoking Section 147 that the expenditure claimed towards licence fee/logo is in the nature of goodwill and having enduring benefit needs to be capitalized. This material found in the original records demonstrate that there was no live link between the reasons recorded and the material available on record except the audit query.

23. It may be apt to refer to the Judgment of the Hon'ble Gujarat High Court in the case of ***'P.C. PATEL AND CO., v. DEPUTY COMMISSIONER OF INCOME TAX' [(2015) 379 ITR 151 (Guj)]***, wherein the Division Bench of Gujarat High Court, after considering the Judgment of ***'CIT v. SHILP GRAVURES LTD., [(2013) 40 taxmann.com 309 (Guj)]***, held that any reassessment proceeding initiated at the instance of the

audit party objection without the Assessing Officer himself having reason to believe that the income chargeable to tax has escaped the assessment must fail. Further, it is observed thus.

> *"5.7. Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case P.V.S. Beedies Pvt. Ltd. (supra) and the decision of the Division Bench of this court in the case of N.K.Industries Ltd. (supra) by Shri Desai, learned advocate appearing on behalf of the Revenue is concerned, it is true that the information given by the audit party and/or on the audit objection, can be used for the purpose of reopening of the assessment. However, for that there must be formation of the opinion by the Assessing Officer and/or Assessing Officer independently has reason to believe that the income chargeable to tax has escaped assessment. Even in a given case it may happen that initially the Assessing Officer might have opposed the audit objection by giving reply to the audit party on the audit objection as normally it is the human tendency to stick to what is held*

*and/or decided. However, subsequently, there can be a formation of the opinion by the Assessing Officer on rethink of the entire issue and even considering the audit objection and may form an independent opinion and/or may have a reason to believe independently that the income chargeable to tax has escaped assessment. However, in a case like this where even while sending the proposal to the higher authority to grant the approval for initiation of the reassessment proceedings, the Assessing Officer still maintain that the audit objection raised by the audit party is not valid and/or correct. Therefore, as such it cannot be said that the Assessing Officer had independently formed an opinion and/or had reason to believe independently that the income chargeable to tax has escaped assessment. From the correspondence between the Assessing Officer and the higher authority it appears that through the Assessing Officer maintains that the audit objection raised by the audit party is not correct, however, as the amount involved is very high as mentioned by the*

*audit party and to safeguard the interests of the Revenue and the guidelines issued the reassessment proceedings have been initiated. Therefore, as such the formation of the opinion by the Assessing Officer that the income chargeable to tax has escaped assessment has been vitiated and, therefore, the impugned reopening of the assessment cannot be sustained and the same deserves to be quashed and set aside."*

24. In a recent Judgment of this Court in the case of ***'COMMISSIONER OF INCOME TAX & ANOTHER v. M/s. GMR HOLDINGS PVT. LTD.,'*** rendered in **ITA No.58/2012 [DD – 31.07.2018]**, the Division Bench has held thus:

*"5. Having heard the learned counsel for Revenue, we are satisfied that no substantial question of law arises in the present case requiring our further consideration in the matter. Learned Tribunal has arrived at reasonable and sustainable findings based on relevant materials and after citing several judgments of other High*

*Courts as well as Hon'ble Supreme Court discussing the grounds on which such re-assessment/reopening can be undertaken and when cannot be undertaken, on the basis of mere audit objection raised by the internal auditors of the Department."*

25. In the said case, Learned Tribunal had set aside the assessment framed by the AO on the basis of notice issued under Section 148 of the Act for reopening the assessment under Section 147 of the Act for the reason that reopening of assessment was due to the objections of the audit party and no independent application of mind was there by the AO further, the assessment order under Section 143[3] of the Act was in consonance with the view taken in the preceding as well as succeeding year. No perversity has been found by this Court in the said judgment of the Tribunal challenged by the Revenue in ***M/s. GMR HOLDINGS PVT. LTD.'s*** case supra.

26. In the present case also, it cannot be disputed that the original assessment order dated 31.08.2009 under Section 143[3] of the Act was in consonance with the view taken in the preceding as well as succeeding year. It is clear that the audit query raised, influenced the AO to take a contrary view against the decision arrived at in so far as allowing the revenue expenditure claimed by the Assessee towards licence fee/logo. These material facts supports the case of the petitioner-Assessee that the reassessment proceedings initiated under Section 147 is without jurisdiction and requires to be set aside.

27. As discussed in the preceding paragraphs, the Assessee has furnished detailed material on the query made by the AO. If such query made is answered by the Assessee, but the AO does not deliberate on that point in the assessment order and does not make any addition in the assessment order, would show that the

issue was examined by the AO, but do not find out any ground or reason to make addition or reject the stand of the Assessee. In the circumstances, it must be presumed that the AO had formed an opinion while framing the assessment under Section 143(3) of the Act. The arguments of the learned Counsel for the Revenue that the issue was not addressed by the AO, is a case of 'no opinion' cannot be countenanced.

28. Paragraph-39 of the full Bench decision of the Delhi High Court clearly envisages that the AO in the first round did not examine the question or subject matter and formed an opinion, would be contrary and opposed to normal human conduct because the aspect or question may be too apparent and obvious. It is identical in the present case also. Thus, I am of the considered opinion that the Revenue has failed to show that the AO had the 'reason to believe' escapement of income to assessment. This view is also fortified by

recent Judgment of the Hon'ble Apex Court wherein the Judgment of ***KELVINATOR*** supra, has been considered. It is for the AO to show the availability of the tangible material to believe escapement of income from assessment. In the absence of establishing any tangible material, it would be mere 'change of opinion'. The schematic interpretation has to be given to the phrase 'reason to believe' contemplated in Section 147 of the Act. Though a word of caution has been expressed by the Hon'ble Apex Court in the recent Judgment of ***M/s. TECHSPAN INDIA PRIVATE LIMITED*** [supra], that every attempt to bring to tax income that has escaped assessment cannot be absolved on an assumed change of opinion even in case where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings, on which much emphasis was placed by the learned Counsel for the Revenue on application of the Judgment to the facts of the case, it is clear that the assessments concluded in

preceding/subsequent years and the implication in the assessment order under Section 143(3) establishes the opinion formulated by the AO on the subject matter. No re-assessment proceedings can be opened based on the Audit objections sans application of mind. It is manifest that the AO had no 'reason to believe', any escapement of income to assessment. Hence, assumption of jurisdiction by the AO to invoke section 147 is unjustifiable. Notice dated 11.02.2014 and the order dated 01.07.2015 are unsustainable.

29. Though learned Counsel for the Petitioner placed reliance on the Judgment of ***I.A.E.C. (PUMPS) LTD.***, supra, to contend that the licence fees paid by the Assessee to the TTK & Company is acquired not as an asset with the benefit of enduring nature to bring the said expenditure as 'capital expenditure' but it is 'revenue expenditure', it would not be appropriate for

this Court to make any observations on the merits of the case at this stage.

30. For the foregoing reasons, Writ Petition is allowed. The impugned notice dated 11.02.2014 vide Annexure-G and impugned Order dated 1.7.2015 vide Annexure-Q are quashed.

**Sd/-**
**JUDGE**

AN/-